Supreme Court, U. S.
FILED
DEC 22 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

NO. 78-649.

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEIL, CHRISTOPHER A. IANNELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, AND JOHN WEIS,

APPELLANTS,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDELL, AND WILLIAM M. YATES,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion for Leave to File and Brief of the Massachusetts Mayors' Association as Amicus Curiae in Support of Appellants' Jurisdictional Statement.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
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APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion for Leave to File Amicus Curiae Brief in Support of Appellants' Jurisdictional Statement.

Pursuant to Rule 42, the Massachusetts Mayors' Association, Incorporated (the "Mayors' Association"), a voluntary, non-profit association of Massachusetts cities, moves for leave to

file an *Amicus Curiae* brief in support of Appellants' Jurisdictional Statement. The written consents of all parties to the filing of the *Amicus Curiae* brief have been obtained and have been filed with this Court.

The Mayors' Association had intended to submit an *Amicus Curiae* brief substantially prior to the consideration of the Jurisdictional Statement (J.S. 32 n.31), but decided to refrain from such a submittal after the stay of the Supreme Judicial Court's decision was granted in this Court on October 20, 1978, by Mr. Justice Brennan as Circuit Justice. The determination not to submit a brief was reaffirmed after this Court's November 6, 1978, denial of Appellees' motion to vacate the stay. However, the Court's intervening silence with regard to noting probable jurisdiction of this appeal has left the Mayors' Association apprehensive that probable jurisdiction might not be noted. The Mayors' Association believes that this would be a mistake, since municipalities, the Mayors' Association and all other publicly funded entities in Massachusetts continue to be subject to a prior restraint on their right to free expression by the Supreme Judicial Court's decision that public funds may not be appropriated and expended for referendum advocacy purposes. Therefore, the Mayors' Association believes that this Court should be made aware of the Mayors' Association's continuing interest and concern on this matter, and it respectfully moves that it be granted leave to file an *Amicus Curiae* brief at this time.

Respectfully submitted,

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Dated: December 22, 1978.

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APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Massachusetts Mayors' Association as Amicus Curiae in Support of Appellants' Jurisdictional Statement.

Pursuant to Rule 42, the Massachusetts Mayors' Association moves to file this brief as *Amicus Curiae* in support of the Appellants' Jurisdictional Statement. The written consents of all parties to file this brief have been obtained and have been filed with this Court.

The Massachusetts Mayors' Association supports the Jurisdictional Statement of the Appellants and adopts their recital of the proceedings below, this Court's jurisdiction, the questions presented and the statement of the case.

I. Statement of Continuing Interest.

A. Interest of the Mayors' Association.

The Massachusetts Mayors' Association, Incorporated (the "Mayors' Association"), was incorporated in 1945 as a voluntary, non-profit association of Massachusetts cities for the purposes, *inter alia*, of studying legislation and advancing and supporting sound state and national government. The Mayors' Association is non-sectarian and non-political in that it never promotes or supports the candidacy of any particular person for public office.

In Massachusetts there are thirty-nine cities and four towns with city councils; those cities and towns are eligible to be members of the Mayors' Association. At present, there are thirty-five members. Dues and assessments to the Mayors' Association are paid by the member municipalities out of public funds appropriated for that purpose from general tax revenues.

The Mayors' Association has an immediate, continuing and compelling interest in this Court's noting probable jurisdiction of this appeal, since the Supreme Judicial Court's construction of Mass. Gen. Laws ch. 55 ("Chapter 55")[1] has cast grave

[1] "[C]omprehensive legislation, enacted after the adoption of the Home Rule Amendment, regulating election financing manifests an intention to bar municipalities from engaging in the expenditure of funds to influence election results. G.L. c. 55, as appearing in St. 1975, c. 151, § 1." (J.S. 8a.)

doubt upon the Mayors' Association's ability as a publicly funded entity, and the ability of its members as elected public officials, to continue engaging in publicly funded advocacy on statewide referenda questions when such advocacy is determined by the Mayors' Association or by its members to be in the best interests of the public they represent.[2]

Because of its broad language and sweeping scope, the Supreme Judicial Court's ban on statewide advocacy by the expenditure of public funds by its "political subdivisions" (J.S. 17a) violates the First and Fourteenth Amendments to the United States Constitution and abridges expression of the Mayors' Association and of other publicly funded entities (such as the Massachusetts League of Cities and Towns, the Massachusetts Selectmen's Association and the Massachusetts Municipal Management Association)[3] that the First Amendment was meant to protect.[4]

[2] This case arose out of the City of Boston's and Mayors' Association's desires to advocate passage of a proposed amendment to the Massachusetts Constitution which would authorize the Massachusetts General Court to "classify real property according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established but proportionately in the same class, and except that reasonable exemptions may be granted." This proposed amendment, known as the "Classification Amendment," would change the state constitutional requirement that all real property be taxed at 100 per cent of fair cash value. On November 7, 1978, the Classification Amendment was overwhelmingly adopted by the Massachusetts voters.

[3] Some of the other entities which are funded in whole or in part by "public funds" (J.S. 18a), and which are therefore affected by Chapter 55's ban include: Association of Town Finance Committees, Local Officials Human Service Council, Inc., Massachusetts Association of Conservation Commissions, Massachusetts Association of School Committees, Inc., Massachusetts Federation of Planning Boards, Inc., Metropolitan Area Planning Council.

[4] The Mayors' Association has a vital interest in upholding its members' First Amendment rights to expend public funds to advocate and inform their

The manner in which the Chapter 55 ban restricts the activities of the Mayors' Association is illustrative of the restraints which it presently imposes upon all publicly funded entities. In furtherance of its goals, the Mayors' Association has, since its inception, not only proposed legislation to the Massachusetts General Court but also engaged in public lobbying efforts with regard to its proposed legislation and with regard to other pending matters when the Mayors' Association believes that doing so is in the best interests of its members and their constituents and advances sound government. Legislative areas in which the Mayors' Association has been involved over the years have included, among others, fiscal, structural and personnel matters.[5]

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inhabitants on statewide referenda questions when such questions are related to the form, function and interests of the municipality.

The Mayors' Association also has a vital interest in upholding the First Amendment rights of Massachusetts citizens to be advised on public issues and to obtain information and arguments regarding referenda questions pertinent to the form, function and interests of their government regardless of the source of such information, in the absence of any findings that free and fair elections would be abused by such advocacy or that publicly funded advocacy would be monopolistic, domineering or calculated to perpetuate any official in office.

[5]The 1978 Mayors' Association's legislative program is representative of its previous annual programs. Fiscal matters included: 1. Creation of a state/local revenue sharing plan, 2. Prohibition of state mandated costs of local government, 3. State assumption of post-secondary, vocational educational costs and 4. Exemption of municipalities from diesel fuels tax.

Structural matters included: 1. Creation of a local government advisory committee, 2. Fiscal home rule for counties, 3. Increasing management capacity of local government and 4. Municipal control over consortiums or regional groupings.

Personnel matters included: 1. Management rights, 2. Exclusion of supervisory personnel from collective bargaining, 3. Study of pension benefit reform and 4. Study of civil service decentralization.

Other matters included: 1. Authorization for a municipality to provide sewer services to subdivisions, 2. Opposition to preemption of local liquor license cancellations and 3. Permanent state assumption of 50 per cent of Massachusetts Bay Transportation Authority costs.

The Mayors' Association currently maintains a joint legislative office with its kindred associations, the Massachusetts Selectmen's Association, the Massachusetts League of Cities and Towns and the Association of Town Finance Committees, in order to administer its legislative program.[6]

The Mayors' Association's activities with regard to this legislative program include informing the voters about pending legislation and encouraging the voters to become involved in the legislative process. The Mayors' Association also solicits voter support for its legislative program and for its lobbying activities.

In addition, the Mayors' Association has, in the past, taken positions on and taken action designed to influence the results of referenda questions proposed to be submitted to the people at statewide elections. In 1976, for example, the Mayors' Association opposed a referendum question that would have authorized a state take-over of private electric power production, in light of the projected loss of municipal taxes paid by privately owned electric companies and the resulting diminution of local tax revenues.

With regard to the Classification Amendment, the Mayors' Association was involved for several years in reviewing, studying and commenting upon it;[7] and ultimately the Mayors' Association concluded that sound government for Massachusetts would be advanced and supported by the adoption of the Classification Amendment. The Mayors' Association therefore embarked upon a campaign to inform the voters of the effects

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[6]The Mayors' Association also maintains a joint administration and finance office, a joint publication policy and shares office space and telephone services with the Massachusetts Selectmen's Association, the Massachusetts League of Cities and Towns, the Massachusetts Municipal Management Association and the Association of Town Finance Committees.

[7]Classification is not a new idea. A Classification Amendment was a state referendum question in 1970; it was defeated at that time.

of classification and 100 per cent valuation and to advocate adoption of the Classification Amendment. A special assessment was made upon all members of the Mayors' Association in order to pay for this campaign. However, the Mayors' Association was forced to abandon this advocacy campaign by the Supreme Judicial Court's decision that "We thus construe G.L. c. 55 as preempting any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question to be submitted to the people at a State election." (J.S. 9a.) The rationale of the ban on municipal appropriations and expenditures plainly extended to all publicly funded bodies and was clearly calculated to encompass the Mayors' Association as such; indeed, the Supreme Judicial Court expressly raised the spectre of a taxpayers' suit against the Mayors' Association with regard to a special assessment made specifically for referendum advocacy purposes.[8]

As a result, for weeks prior to the vote on this important referendum question the Mayors' Association was forced to stand by and refrain from advocacy solely because it is publicly funded, while non-publicly funded corporations and entities were free to disseminate any sort of information they wished — and did so, at great expense. It was only by reason of the stay granted in this Court on October 20, 1978, by Mr. Justice Brennan as Circuit Justice that the Mayors' Association was

[8] "No claim has been made concerning the recovery of funds already expended. . . . In any event, . . . the Massachusetts Mayors' Association, which received $112,550 from the city . . . [for advocacy on the Classification Amendment] is [not] a party to this proceeding. We decline to express any view concerning whatever obligation there may be to restore, or to seek to recover, these amounts which were paid not only after this action was commenced but also after the defendants had knowledge of the action." (J.S. 22a-23a.)

able to engage in referendum advocacy for a brief period prior to the November 7, 1978, vote on the Classification Amendment.

The Mayors' Association is of course delighted with the favorable outcome of the vote on the Classification Amendment and believes that its advocacy efforts might in some small measure have contributed to that outcome. But the issues presented by this appeal are of continuing importance to the Mayors' Association, and to its members, since the Supreme Judicial Court's decision continues to operate as a prior restraint upon the Mayors' Association's and its members' right of free speech to engage in advocacy on future referenda questions of vital concern to the cities and towns they represent.

The Mayors' Association anticipates a substantial number of referenda questions likely to arise in the near future on which it may wish to take a position in the interest of advancing sound local government. Such referenda questions may include: the imposition of tax limits upon state and/or local government, the redistricting of county boundaries, the adoption of a state graduated income tax, the imposition by municipalities of taxes other than real estate taxes, the expansion or contraction of the Massachusetts Home Rule Amendment, substantial changes in the public employment laws, substantial changes in pension benefits for public employees and determinations of how regional transportation systems should be designed and developed. These questions and others like them go to the heart of the form, financing and functioning of state and local governments; they are vitally related to how state and local governments will respond to the needs and desires of their citizens; and they can be expected to arise with growing frequency. Yet, as a publicly funded entity, the Mayors' Association cannot safely advocate positions on any of them in light of the Supreme Judicial Court's decision.

B. Mootness.

Although the vote on the Classification Amendment has taken place, this appeal is not moot, (as Appellees have themselves conceded, see Motion for Reconsideration before Mr. Justice Brennan, p. 4), for it clearly falls within the class of controversies "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). Indeed, this question is identical to that raised in *First Nat'l Bank* v. *Bellotti*, ____ U.S. ____, 98 S. Ct. 1407 (1978), where the 1976 challenge to that portion of Chapter 55 which prohibited business corporations from engaging in referendum advocacy on certain questions did not reach this Court until after the 1976 vote had taken place. In *Bellotti* the Court concluded that the issue was not moot, finding present the two elements identified in *Weinstein* v. *Bradford*, 423 U.S. 147 (1975), which preclude a finding of mootness even in the absence of a class action: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *First Nat'l Bank* v. *Bellotti*, *supra*, 98 S. Ct. at 1414 (quoting from *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)).

The only difference between *Bellotti* and this case is that the Classification Amendment has been adopted. But Appellants and the Mayors' Association should not be penalized for their successful advocacy pursuant to Mr. Justice Brennan's stay. Nor does the law require or permit any such penalty, for both of the elements identified in *Weinstein* v. *Bradford* exist here, as well.

Under no reasonably foreseeable circumstances could the Appellants, the Mayors' Association or any other publicly funded entity obtain plenary review by this Court of the issues

presented here regarding referendum advocacy by a publicly funded entity in advance of a future statewide referendum. The history both of this case and of *Bellotti* demonstrates that such judicial review has been impossible in the past because of the short period of time involved, "and there is every reason to believe that any future suit would take at least as long." *Bellotti*, *supra*, 98 S. Ct. at 1415.

Further, there is every reason to believe that the Appellant, City of Boston, would be subjected to the same action again if it sought to appropriate and expend funds for referendum advocacy. This suit arose pursuant to a Massachusetts statute, Mass. Gen. Laws ch. 40, § 53, which authorizes any ten taxable inhabitants of a municipality to challenge allegedly illegal municipal appropriations and expenditures. If this appeal were to be dismissed, and the stay thereby lifted, all would know that one such successful challenge had been made to the City of Boston's advocacy activities; the fact that this challenge was thwarted by a stay order would hardly deter future challenges by the same or other taxable inhabitants if Boston or any other public body attempted other publicly funded referendum advocacy.[9]

By the very nature of the case, then, this matter falls squarely within this Court's decisions relating to other election mat-

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[9]While this is not a class action, the issues raised in this appeal are relevant to all municipalities, to the Mayors' Association, and to all other publicly funded entities in Massachusetts and elsewhere. Although elections might repeatedly seem to moot this and similar challenges, the basic issue of advocacy with public funds will not go away. See, *e.g.*, *Mountain States Legal Foundation* v. *Denver School District No. 1*, 47 U.S.L.W. 2338 (D. Col., November 28, 1978), where on October 28, 1978, the United States District Court for the District of Colorado granted, on federal constitutional grounds, a request for a preliminary injunction to prevent the implementation of the Denver School Board's resolution authorizing the use of School District facilities and funds to advocate the defeat of a proposed amendment to the Colorado Constitution. That case also could not have reached this Court prior to the November election.

ters, all of which support the proposition that this appeal is not moot. In *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n. 2 (1972), a class action suit challenging a Tennessee law which imposed a residency requirement on voter registration, the Court stated: "Although appellee now can vote, the problem to voters posed by the Tennessee residence requirement is '"capable of repetition, yet evading review."'" In *Storer* v. *Brown*, 415 U.S. 724, 737 n. 8 (1974), this Court upheld the constitutionality of California statutes relating to procedures for persons who seek ballot positions as independent candidates even though the election had come and gone. The Court stated:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' [Cites omitted.] The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. *The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.*" (Emphasis supplied.)

See also, *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), and *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974).

The Appellants, the Mayors' Association and all Massachusetts municipalities and public bodies need a construction and a delineation of the constitutional limits of Chapter 55 vis-à-vis their right to appropriate and expend public funds for advocacy on referenda questions. Faced by the threat of repeated ten taxpayer suits, on similar referenda disputes in the future, no Massachusetts municipality or publicly funded entity can engage in advocacy without fear of an injunction.

II. The Questions Presented are Substantial.

The Questions Presented in the Appellants' Jurisdictional Statement at 5 set forth the matters of greatest concern to the Mayors' Association, as those matters relate to the rights of publicly funded entities. We believe that each of the Questions warrants plenary review and that Appellants' Brief in Opposition to Appellees' Motion to Dismiss sufficiently disposes of the claim that, despite the opinion below and the stay of October 20, 1978, no federal constitutional question is posed. Indeed, the strongest argument for doubting the presence of a substantial federal question — that based on *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907), and advanced by Justices Stevens, Stewart and Rehnquist in their dissent from this Court's November 6, 1978, denial of the motion to vacate Mr. Justice Brennan's stay — seems to the Mayors' Association to have been answered not only by Appellants' November 16, 1978, Brief in Opposition to Appellees' Motion to Dismiss (at 3 & n. 3) but also by this Court's recent reminder that *Hunter* v. *Pittsburgh's* "broad statements as to state control over municipal corporations . . . have undoubtedly been qualified by the holdings of later [election] cases. . . ." *Holt Civic Club* v. *City of Tuscaloosa*, 47 U.S.L.W. 4008, 4011-12 (U.S. Sup. Ct., November 28, 1978) (dictum).

III. Conclusion.

The Massachusetts Mayors' Association submits that this appeal brings before the Court substantial federal questions which are not moot and which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

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Dated: December 22, 1978.